

BOARD OF APPEALS CASE NO. 010

BEFORE THE

APPLICANT: Donald R. Lam

ZONING HEARING EXAMINER

REQUEST: Rezone 1.52 acres from
AG to B2; westside of MD Route 24,
north of MD Route 165, south of Old
MD Route 165

OF HARFORD COUNTY

HEARING DATE: September 30, 1985

Hearing Advertised

Aegis: 8/29/85 & 9/5/85

Record: 8/28/85 & 9/4/85

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ZONING HEARING EXAMINER'S DECISION

The Applicant, Donald R. Lam, seeks rezoning of a vacant 1.52 acre parcel of land, situate on the west side of MD Route 24, north of its intersection with MD Route 165, and north of its intersection with Old MD Route 165, from AG (Agricultural) to B2 (Community Business). The Applicant asserts as the basis for this rezoning that the Harford County Council made a mistake when it zoned the property AG in 1982. The zoning of property surrounding the subject parcel is as follows: to its north, B2 and AG; to the south, AG; to the east, B2; and to the west, AG.

The hearing was held on September 30, 1985, and briefs were filed on October 15, 1985. Only one protestant, Michael Forti, appeared at the hearing. Although the Department of Planning and Zoning's Staff Report, dated July 17, 1985 opposed the request, the Department, prior to the hearing, changed its position and withdrew its opposition.

The Applicant's first witness was Denis Canavan, who was accepted as an expert in planning and zoning. He testified that in 1982, it was a mistake to continue the AG zoning for the property. His opinion was based upon several factors which are not contested. Firstly, MD Route 165, constructed after 1957, generated a new traffic pattern for the area. Secondly, the planning within the area should have recognized that the relocation of MD Route 165 and Route 24 would result in the creation of a major intersection. Thirdly, it is undesirable to use property for residential or agricultural use adjacent to a commercial use. Evidence disclosed that the property to the east of the subject tract contains a service station. Fourthly, it is not suitable for agricultural or residential use.

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Mr. Canavan described that the property could not be used for a residence because of the septic reserve requirements and the requirement that a well must be located 100 feet from a septic reserve. He stated that it would be impossible to locate a residence on the property under current Health Department regulations. Fifthly, in 1977, the Master Plan designated the area Rural Residential, but did not account for any commercial use. In 1982, the four corners were zoned in contravention of the Master Plan. Mr. Canavan noted that the requested rezoning would have no adverse impact on the Master Plan. He stated that in 1982, the Comprehensive Zoning provided for commercial zoning along major intersections. Mr. Canavan stated that Dennis Sigler of the Department of Planning and Zoning had no objection to the proposed request after additional factors were considered.

It is apparent that there are numerous factors which should have been considered in 1982 which support the rezoning.

The relocation of MD Route 165 has shifted the traffic pattern in the area. Old MD Route 165 is not used as frequently. As a result, the "commercial center" has shifted, which results in the subject property now being located in the northwest corner of the intersection. Relocation of MD Route 165 severed the parcel from the adjacent agricultural land to the south, thereby isolating it. The subject property is not suitable for either agricultural or residential use in light of the requirements of the Maryland Department of Health. The Department of Planning and Zoning has indicated that the parcel's dual road frontage and topography do not make it desirable for residential use. The size of the lot would not allow profitable cultivation. The highest and best use of the property, according to Denis Canavan, the Applicant's expert, and the Department of Planning and Zoning, is B2. Apparently, the Department of Planning and Zoning did not have the benefit of these factors when it rendered its recommendation of the Harford County Council, when it zoned the property agricultural.

Although Mr. Forti appeared in opposition to the requested rezoning, he was not able to contest the major factors which support this rezoning. For instance, he did not contest that the relocation of MD Route 165 created a different traffic pattern in the area, nor did he contest that a commercial use was the highest and best use for the property.

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The B2 zoning classification should follow the relocation of the intersection. In 1957, the four corners known as Bush's Corner, was zoned B2 by the Harford County Commissioners. On March 27, 1971, in Zoning Case 6-I-7, the portion of the northwest quadrant of the major intersection as it existed at that time was rezoned by the County Council from AG to B2, based on a mistake in the 1957 rezoning. In 1982, during the Comprehensive Zoning, the four properties in Bush's Corner remained B2. The Council either failed to consider or was not aware of certain factors which would have affected consideration of this property for B2 use. The relocation of MD Route 165 and the consequent shifting of the commercial zone are factors which support the requested rezoning. The fact that the property is not suitable for either agricultural or residential use are additional factors which compel the B2 classification. The Department of Planning and Zoning, by the withdrawal of its opposition has admitted that there were factors which it should have considered during 1982. The Department now admits that the property cannot be zoned agricultural, and that the highest and best use of the property may be the extension of the B2 District. The Staff Report of the Department of Planning and Zoning reflects that the "use will be governed by zoning setback, Health Department, screening, etc., which will help to protect the surrounding community. This will help to keep any proposal compatible with the neighborhood."

In Westview Park v. Hayes, 256 Md. 575, the Court of Appeals stated that, "it is no longer necessary to do more than restate the Maryland rule. There is a strong presumption of the correctness of original zoning of of comprehensive rezoning...and to sustain a piecemeal change therefrom, there must be strong evidence of mistake in the original zoning, or of a substantial change in conditions..."

In Agneslane Inc. v. Lucas, 247 Md. 612, the Court of Appeals referred to the burden of proof as "onerous". As noted earlier, the Applicant relies solely upon the issue of mistake. With the regard to the issue of mistake, the Court of Special Appeals in Boyce v. Sembly, 25 Md. App. 43 stated,

"A perusal of cases, particularly those in which a finding of error was upheld, indicates that the presumption of validity accorded to a comprehensive zoning is overcome and error or mistake is established when there is probative evidence to show that the assumptions or premises relied upon by the Council at the time of the comprehensive rezoning were invalid. Error can be established by showing that at the time of the comprehensive zoning the Council failed to take into account then existing facts, or projects or trends which were reasonably foreseeable

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of fruition in the future, so that the Council's action was premised initially on a misapprehension...cases cited...Error or mistake may also be established by showing that events occurring subsequent to the comprehensive zoning have proven that the Council's initial premises were incorrect. As the Court of Appeals said in Rockville v. Stone, 271 Md. 655, 662, 319 A. 2d 536, 541 (1974):

"On the question of original mistake, this Court has held that when the assumption upon which a particular use is predicated proves, with the passage of time, to be erroneous, this is sufficient to authorize a rezoning."...cases cited...

It is presumed, as part of the presumption of validity accorded comprehensive zoning, that at the time of the adoption of the map the Council had before it and did, in fact, consider all of the relevant facts and circumstances then existing. Thus, in order to establish error based upon a failure to take existing facts or events reasonably foreseeable of fruition into account, it is necessary not only to show the facts that existed at the time of the comprehensive zoning but also which, if any, of those facts were not actually considered by the Council. This evidentiary burden can be accomplished by showing that specific physical facts were not readily visible or discernible at the time of the comprehensive zoning...by adducing testimony on the part of those preparing the plan that then existing facts were not taken into account...or by producing evidence that the Council failed to make any provision to accommodate a project, trend or need which it, itself, recognized as existing at the time of the comprehensive zoning..."

In the instant case, the Department of Planning and Zoning has admitted that it failed to take into account existing facts. While it may have considered facts separately, a consideration of its totality of all of the facts surrounding this request for rezoning indicates that the County Council, during the 1982 legislative process, was in error in granting the rezoning. The Department of Planning and Zoning and the County Council did not consider that the property was not suitable for agricultural or residential use; that the realignment of MD Route 165 would create a new major road intersection; that the property is adjacent to existing commercial uses; that the commercial zoning should have followed the realignment of MD Route 165. While the location of MD Route 165 was known to both the Department of Planning and Zoning and the Harford County Council at the time of the adoption of the Comprehensive Zoning in 1982, the Department's failure to consider its effect upon this property and its unsuitability for either agricultural use or residential development constituted a mistake in the original zoning.

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Accordingly, the Hearing Examiner recommends that the petition for rezoning be granted.

Date October 29, 1985

Gregory A. Rapisarda
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Zoning Hearing Examiner